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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC.; JANIS GAINES, individually, and on behalf of all other persons similarly situated; JANE SELMAN, individually, and on behalf of all other persons similarly situated; CHARLES WETMORE, individually, and on behalf of all other persons similarly situated; JAMES T. BRUEN, individually, and on behalf of all other persons similarly situated; DAVID HEILIGMAN, individually, and on behalf of all other persons similarly situated; THOMAS BANASZEWSKI, individually, and on behalf of all other persons similarly situated; JOANN CLEVENGER, individually, and on behalf of all other persons similarly situated; SYDNEE SCHWARTZ, individually, and on behalf of all other persons similarly situated.

Petitioners,

vs.

THE UNITED STATES JAYCEES; THE NEW YORK STATE JAYCEES; THE UNITED STATES JAYCEES FOUNDATION; THE JAYCEES MENTAL HEALTH AND MENTAL RETARDATION FUND; THE JAYCEES WAR MEMORIAL FUND; PENNSYLVANIA STATE JAYCEES; LOUISIANA JUNIOR CHAMBER OF COMMERCE, INC.; DOWNTOWN CHAPTER OF THE DISTRICT OF COLUMBIA JAYCEES; MAINE STATE JAYCEES; JUNIOR CHAMBER OF COMMERCE OF ORRINGTON, INC.; GEORGE P. SHULTZ, as Secretary of the Treasury of the United States; DON ALEXANDER, as Commissioner of Internal Revenue; THE INTERNAL REVENUE SERVICE OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity; JAMES LYNN, as Secretary of the Department of Housing and Urban Development; PETER J. BRENNAN, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

—over —

Daily Record Corporation
Rochester, New York
(501)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The Petitioners, Junior Chamber of Commerce of Rochester, Inc.; Janis Gaines; Jane Selman; Charles Wetmore; James T. Bruen; David Heiligman; Thomas Banaszewski; Joann Clevenger and Sydnee Schwartz, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on April 16, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. Appendix B is the unreported memorandum decision of the United States District Court for the Northern District of Oklahoma.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 16, 1974. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the federal government can, consistent with the dictates of the United States Constitution's Equal Protection clause and the statutory provisions establishing the national policy to end sex discrimination, furnish the critical financial support to the United States Jaycee organization which excludes women from membership solely on the basis of sex.

2. Whether the United States Jaycees can lawfully exclude women from membership solely on the basis of sex in view of the financial partnership existing between its organization and federal, state and local governments.

Constitutional and Statutory Provisions Involved

United States Constitution — Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

United States Constitution — Fourteenth Amendment: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983: "Every person who, under cover of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or a ny other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress."

Statement of the Case

This is a petition to review the judgment and order of the Tenth Circuit Court of Appeals which affirmed the order of the United States District Court, Northern District, Oklahoma, dismissing plaintiffs' complaint and amended complaint for failure to state a claim upon motion of the government official defendants.

In the fall of 1971, females applied for membership in the Junior Chamber of Commerce of Rochester, Inc. (hereafter, Rochester Jaycees), at that time an affiliate in good standing and the second largest affiliate of the United States Jaycees. The constitution and bylaws of the Rochester Jaycees, consistent with the bylaws of the United States Jaycees and the organization's state and local affiliates, provided for membership only to males between the ages of 21 and 36.

Following the submission of the female applications, the Rochester Jaycees undertook a study of its exclusionary membership policies. The organization membership thereafter voted, in January of 1972, to change the chapter bylaws to provide for admission of males and females to the chapter on an equal basis, concluding that exclusion of females from membership solely on the basis of sex is neither lawful, constitutional nor moral.

As the Rochester Jaycees considered the legality, constitutionality and morality of excluding women from the leadership, business and government service opportunities afforded by organization membership, the United States Jaycee organization was informed of the Rochester Jaycee position. The United States Jaycee organization cautioned the Rochester Jaycees that the organization was "not ready" for admission of women on an equal basis with men. Immediately upon the Rochester Jaycees changing its constitution and bylaws to admit women on an equal basis with men, the United States Jaycees notified the Rochester Jaycees of the suspension of its charter

because of the admission of women. Thereafter, on April 25, 1972, the United States Jaycees, through its state affiliate, New York State Jaycees, caused the Rochester Jaycees to be expelled formally from the Jaycee organization because in admitting women to membership on an equal basis with men, the Rochester Jaycees had taken action inconsistent with the bylaws of the United States Jaycees and action "prejudicial to the best interests of the corporation."

After receiving information from the United States Jaycees that it would take action to interfere with the Rochester Jaycees' operations, the Rochester Jaycees and certain of its male and female members, on October 12, 1972, filed this class action lawsuit for declaratory judgment, injunctive relief and damages in the United States District Court for the District of Columbia.[1] Federal jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1340, 1343, 1361, 2201 and 2202. A three judge court is requested.

The plaintiffs claim that the federal government official defendants directly foster sex discrimination, and thereby violate the Equal Protection clause of the Fifth and Fourteenth Amendments to the United States Constitution by furnishing multimillion dollar grants in aid, contracts, financial assistance and tax benefits to the Jaycee organization. These federal funds and benefits constitute major monetary support for the Jaycee organization without which it could not sustain its present programs. Further, the plaintiffs claim that the financial partnership between the government official defendants and the Jaycee defendants violates the national policy to end sex discrimination and that the underwriting of sex discrimination by the government official defendants is beyond the delegated powers of the government official defendants or that the

[1] The case was transferred by order of February 7, 1973 to the United States District Court for the Northern District of Oklahoma following a mandamus proceeding brought by the United States Jaycee defendants from an order of United States District Court Judge George Hart transferring the case to the United States District Court for the Western District of New York. The Jaycee defendants claimed that the interest of justice and the convenience of the parties would be served by the transfer since their documents and witnesses were located in Tulsa, Oklahoma.

government official defendants are exercising unconstitutional powers. The government official defendants in maintaining a financial partnership with Jaycee defendants have placed the stamp of "government approval" on the Jaycee defendants; the Jaycee defendants, by virtue of their critical dependence on government monies for the performance of their social improvement, governmental functions, are infected with state action and therefore cannot lawfully or constitutionally exclude females from membership.

The United States Jaycees is a non-profit corporation, the purpose of which is to engage in community service activities and provide opportunities for young men to obtain leadership training through participation in its programs. The United States Jaycees is an umbrella organization which has affiliated state chapters and numerous local chapters all of which are obliged to comply with the bylaws of the United States Jaycees or face expulsion from the national organization. The bylaws limit membership to males.

The United States Jaycee organization consists of a least 300,000 male members in some 6,000 local chapters across the United States in some 51 state affiliates in each of the 50 states and the District of Columbia. The motto of the organization is to develop the leadership abilities of its all male membership. This program is accomplished by the Jaycee membership performing social improvement work of a governmental nature with the assistance of and in cooperation with city, state and national governments.

The Jaycee organization rejects any suggestion that it is a private, fraternal or social club. Rather the organization holds itself out as the essential community organization to which any male in the United States between the ages of 18 and 36 ought belong.[2]

[2] After this lawsuit was filed, the Jaycee organization voted to lower the minimum age for membership from 21 to 18 years.

Individual memberships in the Jaycee organization are by and large financed by businesses in the communities of the Jaycee local chapter which extend the membership as a corporate benefit to their promising young personnel. The greater portion of memberships in the Rochester Jaycees, as is characteristic of memberships in Jaycee affiliates across the country, are financed by corporate employers. Corporate and/or business "sponsors" use the Jaycee organization as a leadership training program.

The Jaycee organization considers that its role of developing the leadership potential of its male members is accomplished by contributing the resource of its male membership to perform governmental functions with government resources and in conjunction with government officials. The Jaycee organization has defined its program of performance of governmental functions to include prison reform, job placement services, parolee counseling, construction of low and moderate income housing, drug abuse education, environmental improvement, assistance to the poor, school breakfast programs, venereal disease education, alcoholism education, mental health and mental retardation, safety and governmental affairs, for example.

In connection with the Jaycee organization's performance of governmental services in partnership with the federal government official defendants, the Jaycee organization has negotiated millions of dollars of contracts, grants in aid and financial assistance. The Jaycees obtained an award of at least $258,910.00 from the Department of Health, Education and Welfare for a United States Jaycee Alcohol Abuse Education program which objective ". . . is to develop an ongoing partnership between the Jaycees and the National Institute of Alcohol and Alcohol Abuse . . ." (Plaintiffs' Ex. 265, p. 1)* The

*References are to exhibits in the record in the Court below.

Jaycees describe project ECO, funded by the Department of Health, Education and Welfare, as ". . . a partnership between those who have the knowledge of the environment and those who have the ability to mobilize the public and the available local resources into action programs which insure the continuance of environmental education." (Plaintiffs' Ex. 264, p. 11) The Jaycees, through funding from the United States Department of Labor, counsel only male Job Corps returnees. The establishment of the program is attributed to the nature of the Jaycee membership — its vast network of members in communities across the country. (Plaintiffs' Ex. 110, p. 9 and Ex. 267, attachment) The federal government funds Jaycee efforts to educate communities on the dangers of poisons through Project Parathion. The program is assured of success, the Jaycees suggest, because of the role of its membership as catalysts. (Plaintiffs' Ex. 174, pp. 2, 3) The Jaycee Project Re-Con is a partnership between the Jaycees and federal government in a "nation-wide effort to extend citizen involvement in the promotion and operation of human improvement programs of the individuals who have come in contact with our criminal justice system." (Plaintiffs' Ex. 257, p. 1) Jaycees boast that they have constructed or are in the process of constructing over "a quarter of a billion dollars in non-profit housing" with monies obtained from the Department of Housing and Urban Development. (Plaintiffs' Ex. 251, p. 8) Project Mainstream, a multimillion dollar program funded by the federal government's Office of Economic Opportunity, is described as a "significant partnership" with the government to enable low-income families and individuals to join the economic mainstream of American life.[3] (Plaintiffs' Ex. 251, p. 7)

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[3]The foregoing are examples of the financial partnership existent between the government official defendants and the Jaycee defendants. The plaintiffs claimed at the hearing before the District Court that discovery should be completed on the involvement of the government with the Jaycee defendants prior to decision on the motion to dismiss but the Court, as is set forth more fully hereafter, entered its decision dismissing the complaint as to all defendants with discovery incomplete.

Of the problems which the United States Jaycees have defined for their attention and of the programs which the United States Jaycees have initiated, all of those Jaycee programs are currently being funded in some respect by the federal government or the Jaycee defendants are seeking government monies for the programs. The Jaycee defendants have acknowledged that in December of 1972 federal government funds accounted for approximately $985,000.00 out of a $2.5 million dollar national Jaycee budget, i.e., nearly 40 percent. Besides the multimillion dollar direct contract and financial assistance provided by the federal government offical defendants to the Jaycee organization, the federal government extends millions of dollars of benefits to the Jaycee organization in preferential tax treatment — the granting of Internal Revenue Code Section 501(c)3 or 501(c)4 tax status to all Jaycee national, state and local affiliates and/or affiliate foundations. While the United States Jaycee national office receives the substantial portion of its total operating budget from the federal government, state and local affiliates are also dependent on the tax dollars and financial assistance of city and state governments in the performance of the state and local activities of the organization.

The basis for the Jaycee organization receiving government grants and monetary assistance is the large membership of the Jaycee organization (at least 300,000 members, 6,000+ local affiliates, 51 state affiliates, national staff), the involvement of the membership in leadership positions in communities throughout the country and the availability of the mass membership to volunteer or donate some of their time in the performance of governmental functions.

For example, in justifying the federal government's granting the United States Jaycees a multimillion dollar appropriation to assist the development of the federal government's Equal Employment Opportunity Community Action Agencies, the Jaycees suggested that there ought to be developed a "working

partnership between the Jaycees and Community Action Agencies" because the Jaycees "are an established resource with expertise in educating and mobilizing the public into action programs." Thereafter, the Jaycees outline how the appropriation of government funds in this instance will "indirectly affect the entire Jaycee membership." (Plaintiffs' Ex. 26)

In this same OEO grant application, the Jaycees underscore the benefit which the federal government will obtain by making direct grants to the Jaycees for the performance of government's work. The Jaycees describe in detail how donating the all male membership has multiplied many times the actual value of the government expenditure. Thus, for example, in a 1970 "Do Something" program, the Jaycees calculated that from the original grant of $40,500.00, with volunteer time counted at $2.00 an hour, the Jaycees actually produced governmental service in value of $11,196,944.00.

The plaintiffs allege that this partnership relationship of the government contracting with the all male Jaycee organization for the performance of work which the government is responsible to perform, directly fosters sex discrimination in violation of the Fifth and Fourteenth Amendments to the Constitution and the national policy against discrimination. The government purchases and utilizes the mass male membership of the Jaycee organization to perform its work and to popularize its programs through grass-roots citizen participation efforts in communities throughout the country. The Jaycees utilize government monies to foster the organization's espoused goal of developing leadership skills of "all young men who are affected by this organization, so that they might confront all community problems with imaginative, people-oriented solutions." (Plaintiffs' Ex. 24, p. 2) The government therefore finances an all male leadership training program.

Because of this ongoing relationship, the Jaycees directly involve their membership at the highest levels of local, state and

national government in highly recognized and high profile government civic improvement and social service projects. Through this involvement, the stature of the Jaycee organization is raised to one of influence and prestige.[4] The federal government gains the services of male Jaycee "volunteers" who aspire to obtain positions of leadership in the community by working in cooperation with government officials at all levels.

After the lawsuit was transferred to the Northern District of Oklahoma, the government official defendants moved, by motion of April 12, 1973, to dismiss the complaint on the grounds that no cause of action is stated and the lawsuit is barred by the doctrine of sovereign immunity.[5] Further, the government opposed plaintiffs' application for a three-judge court. The Jaycee defendants answered with general denials, raising the affirmative defense of failure to state a claim. The Jaycee defendants also counterclaimed for judgment awarding them the exclusive use of the names and designations "Jaycees", "Junior Chamber of Commerce", "J.C.'s" or similar names and for judgment of $50,000.00 against each plaintiff.

[4]The Director of the Office of Economic Opportunity at the time of the first grant to the Jaycees was former Jaycee Phillip Sanchez. The grant to the Jaycees was approved in spite of the advice by the Associate Director for Human Rights of the Office of Economic Opportunity that "The Jaycees have a long history of discrimination against women, i.e., female membership in this organization is prohibited." (Plaintiffs' Ex. 187) OEO officials have described their relationship with the Jaycees as one where ". . . we can hold hands here at the headquarters level, even give you some money to set up the structure, if you need it, that will enable you to work with 370,000 Jaycees. . ." (Plaintiffs' Ex. 186) While OEO was in the process of sharply curtailing its operations, the Jaycees, in June of 1973, were assured of new federal monies.

[5]While the government official defendants maintain there is no constitutional or statutory bar to their financial partnership with the Jaycee defendants in hiring males to perform governmental functions, the government in *International Fraternity of Delta Sigma Pi v. Weinberger, et al.* Docket No. 74C 1051, U.S.Dist. Ct., Northern District of Illinois, Eastern Division, is defending its judgment that the University of Illinois must sever all its ties with Delta Sigma Pi, a college undergraduate fraternity which admits only males, or lose federal funding.

By order of May 4, 1973, the district court judge, the Honorable Luther Bohanon, scheduled an "evidentiary hearing" on the motion to dismiss for June 13, 1973, directing that the plaintiffs show why the lawsuit could be maintained against each of the defendants, why the action should be maintained as a class action, why a three judge court should be convened, among other points. Counsel were invited to offer "any other pertinent evidence."

Prior to the "evidentiary hearing", plaintiffs filed Request for Admissions, Notice to Produce and Interrogatories. The defendants never fully complied with the discovery requests, maintaining that they did not have sufficient opportunity to assemble the information requested and that the information was not available in Tulsa — although on their motion for transfer to the Northern District of Oklahoma, they claimed records were in Tulsa.

With the consent of all parties, the Court filed plaintiffs' amended complaint, on June 13, 1973. The Philadelphia Jaycees, its foundation, the New Orleans Jaycees and certain of the male and female members of Philadelphia and New Orleans Jaycees were added as plaintiffs and named members of the class. Sydnee Schwartz and Joan H. Slyne, females who have been denied opportunities for membership in the District of Columbia Jaycees and the Orrington, Maine Jaycees were also added as plaintiffs and named members of the class. The respective state affiliates of the Jaycee organization were added as defendants.[6]

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[6]The threat of the Jaycee organization to expel the Philadelphia Jaycees because it had admitted women on an equal basis with men was imminent at the time of the "evidentiary hearing". Plaintiffs requested temporary injunctive relief to prevent this expulsion and any other action against any class member. The Jaycee defendants agreed to a temporary restraining order, renewable at ten-day intervals, restraining action against plaintiffs and class members. Immediately on learning of the district court's decision dismissing the complaint, the Jaycee defendants expelled the Philadelphia Jaycees. The Tenth Circuit Court of Appeals refused to grant plaintiffs' immediate application for injunctive relief to restore Philadelphia Jaycees to membership and to prevent further acts against the plaintiffs and class members. Thereafter, the New Orleans Jaycees and its President, Richard Esteves, withdrew their appeal from the district court decision after continued threats from the Jaycee defendants as to the possible expulsion of the New Orleans chapter.

At the "evidentiary hearing", the judge allowed plaintiffs, over the objection of the defendants to introduce evidence of the official government defendant and Jaycee partnership which had been disclosed in the brief period prior to the "evidentiary hearing".[7] While the judge directed the Jaycee defendants to furnish additional information to the plaintiffs within seven days of the completion of the "evidentiary hearing" on the government official defendants' extension of tax benefits to the Jaycee defendants, the Jaycees did not comply with that direction and the district court judge issued his order dismissing the complaint with discovery incomplete.

Judge Bohanon, in a two-page opinion, on June 26, 1973 dismissed the complaint against all defendants without citing any authority as to why the complaint failed to state a claim.[8] The court characterized the complaint as failing to state that "... any of the funds granted or allowed to the Jaycees for sponsoring these specific projects is used in any wise to promote any type of discrimination." (B-3)[9] The District Court did not discuss any of the evidence in the record in the form of copies of federal contracts with the Jaycee defendants which illustrate the performance of governmental functions by the all male Jaycee

[7]Plaintiffs also stressed that the legality and constitutionality of the Jaycee organization excluding women from membership and the government's furnishing of the critical financial support to the Jaycee organization are issues of national importance being raised certainly in every major metropolitan area of the United States where there is a Jaycee local affiliate. The plaintiffs introduced documentary evidence of support for the plaintiffs' position from Jaycee local affiliates in all sections of the country. The Jaycee defendants have continued to threaten to expel local affiliates who admit women, the most recent such threat of expulsion having been forestalled by preliminary injunction issued in *The New York City Jaycees, Inc. v. The United States Jaycees, Inc., et al.* Docket No. 74 Civ. 652 (MIG), June 13, 1974, appeal filed June 28, 1974, with the court finding the same Jaycee/government official defendant partnership alleged herein, to constitute, in that case, state action.

[8]The District Court also ruled that there was no substantial federal question presented by the pleadings and therefore that plaintiffs' application for a three-judge court ought be denied. In the same conclusory language, the court also ruled that the action ought not proceed as a class action.

[9]References are to the Appendix of this petition.

membership. The United States Court of Appeals in its decision of April 16, 1974, affirms the District Court order dismissing the complaints as to all defendants.

The Court first suggests that plaintiffs' claims of violation of constitutional and statutory rights hardly rise to the level of jurisdictional sufficiency observing that this is ". . . somewhat of a borderline situation in which the facts are of minimal assistance," and that the Court is tempted to dismiss the case for lack of jurisdiction since ". . . the plaintiffs demand an enormous amount, that is, injunctive relief against high officials of the United States . . ." But, wishing to reach the merits of the case, the Court concludes that it will determine ". . . whether there is a sufficient federal claim upon which relief can be granted." (A-7)

Without commenting upon and apparently ignoring the substantial evidence in the record presented by the plaintiffs through documentation of projects, grants, et cetera, between Jaycee local chapters across the country and state and municipal governments, the Court concludes that there is not the "essential state action" present for the complaint to state a cause of action in violation of 42 USC § 1983. The Court disregards the evidence in the numerous exhibits before the Court which demonstrate that the essence of the Jaycee organization relationship with municipal, state and federal governmental units is the performance of governmental functions with the financial help of taxpayer dollars and in conjunction with government officials. Rather the Court concludes that the partnership relationship existing between the Jaycee organization and governments does not amount to encouragement or promotion of discrimination — that "The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees." (A-9)

While recognizing in its opinion that the ". . . evidentiary hearing held by the District Court revealed that the United

States Jaycees administer substantial grants on behalf of the government."[10] (A-4), the Court continues to ignore the substance of the evidence demonstrating the government's contracting for the performance of its governmental functions by males only. The Court holds that there is not "sufficient *nexus*" between the discriminatory membership policies and the expenditure of government funds. The Court observes that the criteria announced by this Court ". . . have tended to require that the alleged unconstitutional conduct relates specifically to governmental action." (A-12) Thus, though the federal government's support of the Jaycee organization is enormous, the Court concludes that the plaintiffs have no compiaint against the federal government to stop the multimillion dollar funding of the performance of governmental functions by all males.

Further, with respect to plaintiffs' claims that the federal government official defendants, in furnishing multimillion dollar grants in aid and tax benefits to the Jaycee organization, directly fosters, supports and perpetuates unconstitutional and illegal sex discrimination, the Court concludes that the doctrine of soverign immunity applies to exempt the government official defendants from suit. ". . . [T]here is neither an unconstitutional act on the part of the officers involved nor an action beyond the scope of the authority granted." (A-13) Finally, the Court suggests that the plaintiffs' request that the tax exempt status of the United States Jaycees be revoked amounts to ". . . tremendous and disproportionate demands which are beyond the realm in which the Court can grant relief." (A-13).

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[10]The Court refers to plaintiffs' Exhibit 23, a memorandum prepared by the Jaycee defendants regarding this case and circulated to Thomas S. Rittenhouse, later a plaintiff in this case, among others. In this memorandum, the Jaycee defendants analyze their partnership relationship with the government and conclude that "Absent new limitations on the doctrine of 'state action' . . . there is little chance that a finding of state action in the present case can ultimately be avoided." Plaintiffs' Exhibit 23, p. 16.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Conflicts with the Decisions of this Court and the Decisions of other Courts of Appeals

The decision of the Court below is in direct conflict with this Court's rulings on what constitutes state action — both as to what constitutes unconstitutional federal involvement in discrimination and as to what constitutes unconstitutional involvement of government with an otherwise private entity which subjects the private entity to the restrictions of the United States Constitution. This Court, in its decision, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), directed that there be a weighing and sifting of all the circumstances of government involvement in determining what constitutes impermissible state action.

Where the question has been presented as to what amount of activity either the federal government or a state or local government can undertake in conjunction with an entity which discriminates, this Court has underscored that any assistance by a governmental unit which significantly aids an entity which discriminates is constitutionally impermissible. *Norwood v. Harrison*, 413 U.S. 455 (1972). Commenting on impermissible government aid to racial discrimination, the Court has stated:

> ". . .[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. '[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up to only 49 percent of the support of the segregated institution.'" *Norwood v. Harrison*, supra, at 465-466.

This Court reiterated the absolute bar, under the Constitution, of a governmental entity aiding discrimination in any significant way with its June 17, 1974 decision in *Gilmore v. City of Montgomery*, 42 L.W. 4920 (6/18/74). The Court in *Gilmore* upheld the lower court's ruling that the City of Montgomery could not constitutionally grant exclusive use of city facilities to private, racially segregated schools. The Court reversed the lower court's ruling that a government could permit the same or similar relationship with a private group, club or organization which has discriminatory membership policies and remanded the case to the lower court to determine whether the use of city facilities by private clubs and organizations which limit membership to whites significantly aids race discrimination.

While the Court below relied on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in reaching its conclusion that the partnership between the government official defendants and the Jaycee organization is permissible, *Moose Lodge* actually supports a conclusion of unconstitutionality of the government-Jaycee organization partnership. As this Court has explained both in *Norwood v. Harrison*, supra, and in *Gilmore v. City of Montgomery*, supra, the furnishing by a governmental unit of generalized governmental services — electricity, water, police and fire protection — to an entity that discriminates does not in and of itself constitute a showing of state involvement in invidious discrimination. Nor did, as the Court observed in *Moose Lodge No. 107 v. Irvis*, supra, the state's extension of a liquor license to an entity which discriminates, in and of itself constitute such state involvement in invidious discrimination.

However, the factors which the Court in *Moose Lodge No. 107 v. Irvis*, supra, observed would dictate a finding of impermissible state involvement in discrimination are present in this case. The Moose Lodge was found by the Court to be a private club in the ordinary meaning of that term: having well-defined requirements for membership, conducting its activities

in private and not being publicly funded. The Jaycee organization rejects any view of itself or its activities as private. Membership of all young males in the United States is encouraged. All of its activities are public and performed in the name of the public good with the active participation and support of governments at all levels and with government furnishing the critical financial backing for Jaycee organization projects at all levels.

The Court below also misconstrues this Court's holding in *Walz v. Tax Commission*, 397 U.S. 664 (1970) when it suggests that the tax exemptions granted by the government official defendants to the Jaycee organization are ". . . even less subject to constitutional attack than would [be] an exemption granted to a church . . ." (A-11). As the lower court noted in *Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971), aff'd. sub nom *Coit v. Green*, 404 U.S. 997 (1971), and as this Court noted in *Norwood v. Harrison*, supra, cases under the First Amendment Establishment Clause, such as *Walz v. Tax Commission*, supra, are not dispositive of cases where a practice of discrimination is under attack. The Court has acknowledged room for ". . . 'play in the joints' to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors." *Norwood v. Harrison*, supra, at 469. But there is no such leeway in a discrimination case because the Constitution ". . . places no value on discrimination as it does on the values inherent in the Free Exercise Clause." *Norwood v. Harrison*, supra, at 469-470.

In considering whether the actions of an otherwise private entity have become so entwined with the activities of a governmental unit so as to warrant a finding that the actions of the private entity are in fact state action and therefore subject to the restraints of the Constitution, the *Burton v. Wilmington Parking Authority* analysis again dictates the finding that the

government-Jaycee partnership is unconstitutional. In *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al.* Docket No. 74 Civ. 652 (MIG), June 13, 1974, appeal filed, June 28, 1974,[11] the United States District Court for the Southern District of New York, the Honorable Murray I. Gurfein presiding, ruled that, paraphrasing *Burton v. Wilmington Parking Authority*,

> "I think here the federal government 'has so far insinuated itself into a position of interdependence with [National] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth [Fifth] Amendment.' " (C-13).

The Court in the *New York City Jaycees, Inc. v. United States Jaycees, Inc., et al.* had before it the impending action of the United States Jaycees to expel the New York City Jaycees for admitting women to membership — one of the same questions and of course the central question in this lawsuit, i.e., the exclusion of the Rochester Jaycees by the United States Jaycee organization because of the admission of women to membership.

Counsel for the United States Jaycees argued, in defending against a finding of state action and the issuing of a preliminary injunction, that this case dictates a finding of no state action. However, the New York Court notes that the facts in the lower court's decision in this case "... are not clearly set forth. Moreover, if the record in the District Court in Oklahoma is substantially the same as that in this Court, then I must respectfully disagree with that part of the opinion." (C-15, n. 34).

The record in this case is substantially the same record as that in *The New York City Jaycees, Inc., v. United States Jaycees, Inc., et al.* The Court found as fact in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al* that the program emphasis of the Jaycee organization is on community

[11] This decision, as yet unreported, is Appendix C hereto.

services such as low-cost housing, prevention of child abuse, convict rehabilitation, transportation for the elderly, control of the environment, and many other civic activities and that membership in the Jaycees "... is also still linked to advancement in the business community." (C-4) Plaintiffs in this case made similar allegations and substantiated those allegations in the record from testimony and with the introduction of documents.

The Court in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al* found that the United States Jaycees for one fiscal year received nearly as much money from the federal government as it received in dues from its own members[12] and that the United States Jaycees and/or its wholly owned foundation is the recipient of multimillion dollar grants from the Department of Health, Education and Welfare, the Office of Economic Opportunity and the Labor Department. The record in this case contains not only copies of those federal grants but also copies of other federal grants to the Jaycee organization and foundation plus a number of project reports by the Jaycee affiliates across the country demonstrating the reliance of the Jaycee affiliates on tax dollars from municipal and state governments in addition to the federal tax dollar.

The largest single government grant to the Jaycee organization, the OEO Project Mainstream grant to which the District Court in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al*, supra, makes frequent reference, is in evidence in this case. The "... congeries of factors here involved make the action of the United States Jaycees in attempting to revoke the charter of the New York City chapter 'state action' and subject to the jurisdiction of the federal courts." (C-13) So too is the action of the United States Jaycees in excluding the Rochester Jaycees because it admits women to membership impermissible state action.

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[12]For budget year ending July 1, 1974, the United States Jaycees received $1,143,000.00 of its $3,639,000.00 budget from the federal government while receiving $1,200,000.00 in membership dues. (C-4)

The finding of the Court below that the Jaycee-government partnership does not constitute state action is contrary to the findings of other Courts of Appeals of state action on less indicia of government involvement in the private entity activities. For example, in *Sam's v. Ohio Valley General Hospital Association*, 413 F.2d 826 (4th Cir. 1969), *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966), *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938 (1964), the Courts found the action of private hospitals in discriminating as to staff appointments and hospital privileges, as to patients or as to the use of the employee dining room, to be state action where the hospital receives substantial federal money. In *Smith v. Young Men's Christian Association of Montgomery, Inc.*, 316 F.Supp. 899 (M.D. Ala. 1970), modified and aff'd., 462 F.2d 634 (5th Cir. 1972), and in *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), cert. den. 326 U.S. 721 (1945), the Courts held the exclusion of blacks by a private entity was unconstitutional because the private entity was performing a public function — recreation and library, respectively — with substantial government assistance. The facts in this case meet all the criteria for a determination of state action as outlined by the Second Circuit Court of Appeals in its recent decision, *Jackson v. The Statler Foundation, et al.* Docket No. 73-1543, September Term, 1973, Slip Opinion April 5, 1974.

II

There are Important Federal Jurisdictional and Procedural Issues Involved

The Court below, in affirming the dismissal of plaintiffs' complaint created grave issues of federal jurisdiction and procedure. The Court's conclusion that plaintiffs' claims against the government official defendants that their actions are either beyond their delegated powers or the delegated powers are unconstitutional are without merit flies in the face of this Court's

direction that on a motion to dismiss, a federal court must give the complaint its broadest reading, accepting as true the allegations in the complaint. *Conley v. Gibson*, 355 U.S. 41 (1957).

The conclusion of the Court below that plaintiffs' prayer to void the tax exempt status of the United States Jaycees is ". . . beyond the realm in which the Court can grant relief," (A-13) ignores the summary affirmance by this Court of *Green v. Connally*, supra. In *Green v. Connally*, supra, the Court upheld denial of tax exemptions to private, white academy foundations which exclude enrollment of blacks. The Court concluded that the granting of tax exempt status to such entities which discriminate is not within the delegated powers of government officials, thereby avoiding the constitutional question. The plaintiffs in this case make the same arguments — that the extending of the multimillion dollar tax benefits by the government official defendants to the Jaycees promotes the sex discrimination of the Jaycees and that such acts of government officials are not within their delegated powers or the powers are unconstitutional.

Since the *Green v. Connally* case, the same arguments have been made with success in various other lawsuits. See for example, *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972); *Pitts v. Department of Revenue*, 333 F.Supp. 662 (E.D. Wis. 1971); *Falkenstein v. Department of Revenue*, 350 F.Supp. 887 (D. Ore. 1972), appeal dismissed, 409 U.S. 1099 (1973); see also, *Jackson v. The Statler Foundation, et al*, supra, where the Court remanded a pro se complaint, noting that the plaintiff could state a claim against the government by adding the appropriate government official defendants. No court, with the exception of the Court below in this case, has ever suggested that the government official defendants involved in promoting discrimination through the extension of tax benefits to entities which discriminate are immune from suit or that the request for injunctive relief to discontinue the extending

of that official support of discrimination are "... demands which are beyond the realm in which the Court can grant relief."[13]

III

The Decision Below Raises Significant and Recurring Problems Concerning the Rights of Female Citizens to Equal Protection of the Laws.

This Court has acknowledged this country's unfortunately long history of discriminating against women, and the federal government's commitment, in various legislation, to end discrimination on the basis of sex. *Frontiero v. Richardson*, 411 U.S. 677 (1973). Indeed, the Court below at least recognizes the constitutional guarantee of equal treatment for women by observing that, "There is no dispute about the invalidity of discrimination by the state or federal government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex." (A-5) However, the Court below proceeds to dismiss all of plaintiffs' claims by concluding that there is no "nexus" between the Jaycees receiving millions of dollars in

[13] While the Court, after laborious consideration of the point, finally concludes that it has jurisdiction to consider plaintiffs' claims, its observation that this case is a "borderline situation" of jurisdiction has astounding implications for what was thought to be well-settled recognition of the right of persons in this country to litigate claims of violation of constitutional rights in the federal courts. This Court's rule on reviewing a complaint for the statement of a claim of violation of constitutional right is, as the Court below noted in referring to *Bell v. Hood*, 327 U.S. 678 (1946) and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), that a suit may be dismissed for lack of jurisdiction only where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The federal government's fostering of sex discrimination by the furnishing of critical monetary support to the Jaycee organization through multimillion dollar contracts, grants in aid, financial assistance and tax benefits — all in violation of the Constitution and the national policy to end discrimination on the basis of sex — is hardly a wholly insubstantial or frivolous claim.

federal tax monies and tax benefits and the administration of Jaycee social improvement projects.

The federal government purchases the all male membership of the Jaycees to perform governmental functions through the extension of multimillion dollar grants in aid and contracts to the Jaycee organization. This Court, time and again, in the context of scrutinizing governmental activities, has held that a government may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish. See for example, *Norwood v. Harrison*, supra, and cases cited therein. The government may not, under the Constitution, hire only blacks or only whites to perform its work; nor can the government, under the Constitution, hire only males to perform its work, as it does when it contracts with the all male Jaycee organization to perform governmental functions.

The decision of the Court below, notwithstanding its acknowledgment of the illegality of discrimination on the basis of sex, contravenes this Court's holdings in *Frontiero v. Richardson*, supra, and *Reed v. Reed*, 404 U.S. 71 (1971), that discrimination on the basis of sex is invidious discrimination and unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. Presented with the same fact pattern as in this case, the Court in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al* found that, in line with this Court's decisions in *Reed v. Reed*, supra, and *Frontiero v. Richardson*, supra, the irrational exclusion by the Jaycees of females from membership violates the constitutional guarantees of equal protection. In the Court's view, sex discrimination stands on the same footing as race discrimination — both equally prohibited by the Constitution. "We may, accordingly, think of sex as a suspect class not only in the test of what is discrimination but in the tilting of the scale in what constitutes state action." (C-13).

This Court ought to act to clarify once again for all federal courts that sex discrimination is invidious discrimination,

prohibited, as race discrimination, by the Constitution and that government involvement in activity which directly or indirectly fosters, promotes or in any way significantly aids sex discrimination is unconstitutional. Further, the Court ought accept this case for review and clarify for all federal courts that the entwining of the activities of government with a private entity in a partnership relationship for the performance of governmental functions constitutes state action and compels the private entity to follow the dictates of the United States Constitution, in this case admitting females to membership on an equal basis with men.

CONCLUSION

For these reasons, Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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July 11, 1974

APPENDIX A

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 73-C-66)

UNITED STATES COURT OF APPEALS

Tenth Circuit

No. 73-1560

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., Rochester, New York, et al.,

Plaintiffs-Appellants,

v.

THE UNITED STATES JAYCEES, Tulsa, Oklahoma, et al.,

Defendants-Appellees.

Judith R. Cohn of Wolf, Block, Schorr and Solis-Cohen, 12th Floor, Packard Building, Philadelphia, Pennsylvania (E. Gerald Riesenbach of Wolf, Block, Schorr and Solis-Cohen, on the brief), for Appellants Junior Chamber of Commerce of Philadelphia, Pennsylvania, Thomas S. Rittenhouse, Beverly Lynn Benson, Margaret M. Hipple and Roberta M. Schneider; Emmelyn Logan-Baldwin, 19 Arnold Park, Rochester, New York for Appellants Junior Chamber of Commerce of Rochester, Inc., Janis Gaines, Jane Selman, Charles Wetmore, James T. Bruen, David Heiligman, Thomas Banaszewski and Sydnee Schwartz; Debra A. Millenson, 1800 G Street, N.W., Washington, D.C., for Appellant Joann Clevenger; Josephine L. Citrin, 18 Cobbert Road, Portland, Maine, for Appellant Joan H. Slyne; S. Chandler Visher and James Hautsinger of Dawson, Nagel,

Sherman & Howard, 1900 First National Bank Building, Denver, Colorado, local counsel to all Appellants.

Robert J. Corber, 1250 Connecticut Avenue, N.W., Washington, D.C. (Gary Taylor, 2301 First National Bank Building, Denver, Colorado, and Ronald S. Cooper and Kenneth I. Jonson II, 1250 Connecticut Avenue, N.W., Washington, D.C., Of Counsel, on the brief), for the private Appellees.

Ann Belanger, Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks and Jonathan S. Cohen, Attorneys, Tax Division, Department of Justice, Washington, D.C. and Nathan G. Graham, United States Attorney, Of Counsel, on the brief), for the federal Appellees.

Before BREITENSTEIN, McWILLIAMS and DOYLE, *Circuit Judges.*

DOYLE, *Circuit Judge.*

This is a sex discrimination case. Appellants seek review of a judgment of dismissal of the United States District Court for the Northern District of Oklahoma. The claim of the appellants in the District Court was that the United States Jaycees unconstitutionally excluded the Junior Chamber of Commerce of Rochester, New York and the individual appellants from affiliation and membership in the United States Jaycees. Similar claims are asserted by the Junior Chamber of Commerce of Philadelphia and of New Orleans, Louisiana, and individual members of those organizations. Appellants also asserted in District Court that certain named federal officers impermissibly support the United States Jaycees and various state and local Jaycee chapters by allowing them tax exemptions and by utilizing them to implement federal grants and programs.

The controversy was the result of the United States Jaycees' bylaws limiting membership to males. On this account the Junior Chamber of Commerce of Rochester was expelled from the United States Jaycees because it had chosen to admit women as members. Individual members of the Rochester Jaycees were then prevented from becoming affiliated with the United States Jaycees and thereby lost certain opportunities to take part in the charitable work of the United States Jaycees, part of which involved the transmission of federal funds to the needy. Appellants allege that the United States Jaycees are violating the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. §1983, by prohibiting women from becoming members of the United States Jaycees and any state or local Jaycees organization. [1]

Various federal statutes, including the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, are relied on to gain admittance to federal court for the purpose of asserting the alleged violation. According to the allegations of the amended complaint, the Jaycees and various state chapters thereof received substantial tax benefits under §§501(c) (3) and (c) (4) of the Internal Revenue Act and also various federal grants and contracts from OEO and other departments of the United States Government. It is alleged that the various Jaycee organizations use federal funds to sponsor HEW programs, including construction of housing projects and assistance to underprivileged children.

From all of this, it is the position of plaintiffs that the United States Jaycees is in practical effect an arm of the government and that therefore when it discriminates in its membership

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[1] Why the defendant Jaycees would so adamantly oppose members of the feminine sex in its organization is most difficult to understand. It may well be that they fear the competition. They may indeed be concerned as to the known propensity of members of the feminine sex to devote themselves to causes such as this. We are not, however, permitted to pursue this inquiry — our mission being to ascertain whether the action complained of is sufficiently governmental to justify the federal courts' entertaining and taking cognizance of the claims.